

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF APPLICATION )  
NUMBER G3-25233 FOR PERMIT TO )  
APPROPRIATE PUBLIC WATERS )

CLAUDE H. PAIR, )

Appellant, )

v. )

STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY and )  
LEHN RANCHES, INC., )

Respondents. )

PCHB No. 77-189

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This appeal challenges the validity of an Order by the Department of Ecology that a permit for ground water be issued to Lehn Ranches, Inc. The matter came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, on May 8, 1978 in Spokane, Washington. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230. Appellant Claude H. Pair appeared pro se.

Respondent Department of Ecology appeared by and through its attorney, Robert E. Mack, Assistant Attorney General. Respondent Lehn Ranches, Inc. appeared by its officer, Richard L. Lehn. Spokane court reporter Sally Ann Littell recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. Having heard the testimony and examined the exhibits, and being fully advised, the Pollution Control Hearings Board makes these

#### FINDINGS OF FACT

##### I

Appellant Claude H. Pair owns land in the NW1/4 of Sec. 5, T. 18 N., R. 45 EWM near Belmont, Washington, which is in Whitman County. There he has a domestic well which is some 44 feet in depth. Although he has not recently measured, appellant believes that the static water level in the well is 18 feet.

##### II

On February 23, 1977, respondent Lehn Ranches, Inc. made application for a right to withdraw public ground water for irrigation in SE1/4 of Sec. 21, T. 19 N., R. 45 EWM, approximately three miles from appellant's domestic well. The application sought 800 acre-feet per year for seasonal irrigation of 800 acres between March and November of each year.

The principal crops which Lehn Ranches, Inc. seek to irrigate with this ground water are lentils or wheat. For those crops, irrigation is only required on an occasional basis, as a supplement to the rain which falls in that region during normal times. In the spring of 1977, when this application for ground water was made, however, severe drought conditions were at hand and Lehn Ranches, Inc. sought

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1 to construct a well and begin withdrawal as swiftly as possible.  
2 Consequently, the Department of Ecology authorized a test well, and  
3 Lehn Ranches, Inc. contracted for construction during pendency of the  
4 application for a permanent ground water right which is now before us.  
5 Error in the hasty construction of the test well resulted in a crooked  
6 well shaft that permitted casing to a depth of only 164 feet despite  
7 the Department's requirement of casing to 300 feet. The test well is  
8 only 256 feet in depth, but did supply substantial quantities of water.

### 9 III

10 Upon publication of the ground water application of Lehn Ranches,  
11 Inc., the Department received letters of protest from 24 persons  
12 including the appellant, living near the site of the specified point of  
withdrawal. Appellant, like the other protestants, feared that the  
14 application, if granted, would reduce the water level or possibly  
15 dry up domestic wells which range to about 200 feet in maximum depth.  
16 In the past, the U. S. Geological Survey has observed static water  
17 levels in area wells. In wells less than 200 feet deep, the static  
18 water level is considerably higher than in wells more than 200 feet  
19 deep, indicating no hydraulic continuity between the upper "domestic"  
20 aquifers and the lower aquifer which is primarily used for irrigation.  
21 These records show that levels in shallow domestic wells have remained  
22 stable over time.

23 Neither the "Findings of Fact and Order" of the Department of  
24 Ecology, nor the underlying Report of Examination explicitly state the  
25 depth of the well to be permitted. The well depth to be permitted is  
therefore 350 feet as stated in the application of Lehn Ranches, Inc.  
27 This depth would penetrate the lower aquifer. This raises the possibility

1 that water in the upper aquifer might laterally seep into the deep well  
2 shaft and "cascade" to the bottom, thus draining the upper aquifer.  
3 Therefore, on November 30, 1977, when the Department of Ecology issued  
4 its "Findings of Fact and Order" authorizing a permit to Lehn Ranches,  
5 Inc. it inserted the condition that the walls of the well shaft be "cased"  
6 to a depth of 300 feet. This requirement would seal off the upper,  
7 domestic aquifer and retain its hydraulic separation from the lower  
8 aquifer, from which Lehn Ranches, Inc. seeks to withdraw.

9 IV

10 Appellant has no exact idea of the extent, if any, to which the  
11 level in his domestic well would be lowered as a result of the  
12 development of the well applied for by Lehn Ranches, Inc. and which  
13 is now before us. He urges, however, that no permit may be granted  
14 which will result in any detrimental effect on the water level in his  
15 domestic well.

16 V

17 The Lehn application for ground water reveals an existing surface  
18 water right for irrigation of 750 of the same 800 acres covered by  
19 the ground water application. That surface water right is embodied  
20 in Certificate No. 10982 issued to "Revel Estate and Steven R. Lehn  
21 Estate." That surface water right is for withdrawal from Pine Creek,  
22 which is an undependable source of irrigation water.

23 VI

24 Any Conclusion of Law which should be deemed a Finding of Fact  
25 is hereby adopted as such.

26 From these Findings, the Pollution Control Hearings Board comes

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1 to these

2 CONCLUSIONS OF LAW

3 I

4 Appropriation of public ground waters is regulated by chapter 90.44  
5 RCW. The stated purpose of that chapter is to extend to ground waters  
6 the law which regulates appropriation of surface waters, chapter 90.03 RCW.  
7 (RCW 90.44.020). Permits for the withdrawal of public ground water are  
8 governed by RCW 90.03.250 through 90.03.340. (RCW 90.44.060).

9 The statutory section which sets out the legal standard by which  
10 permits are to be granted or denied is RCW 90.03.290 which provides,  
11 in relevant part:

12 When an application complying with the provisions of this  
chapter and with the rules and regulations of the supervisor  
of water resources<sup>1</sup> has been filed, the same shall be placed  
14 on record in the office of the supervisor, and it shall be  
his duty to investigate the application, and determine what  
15 water, if any, is available for appropriation, and find and  
determine to what beneficial use or uses it can be applied  
16 . . . The supervisor shall make and file as part of the  
record in the matter, written findings of fact concerning  
17 all things investigated, and if he shall find that there is  
water available for appropriation for a beneficial use, and  
18 the appropriation thereof as proposed in the application will  
not impair existing rights or be detrimental to the public  
19 welfare, he shall issue a permit stating the amount of water  
20 to which the applicant shall be entitled and the beneficial  
21 use or uses to which it may be applied . . . But where  
22 there is no unappropriated water in the proposed source of  
supply, or where the proposed use conflicts with existing  
23 rights, or threatens to prove detrimental to the public  
interest, . . . it shall be the duty of the supervisor to  
24 reject such application and to refuse to issue the permit  
asked for . . . In determining whether or not a permit  
shall issue upon any application, it shall be the duty of the

25 1. The office and duties of the Supervisor of Water Resources  
26 have now passed to the Department of Ecology. RCW 43.27A.180,  
27 RCW 43.27A.080, RCW 43.21A.020.

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1 supervisor to investigate all facts relevant and material  
2 to the application. . . . . (Emphasis added.)

3 There is water available for appropriation; it will be applied  
4 to a beneficial use, and will not detrimentally affect the public  
5 welfare. The key issue upon which appellant seeks a determination  
6 is whether the withdrawal applied for by Lehn Ranches, Inc. will  
7 impair his or any other existing water right.

8 II

9 We have previously held that a supplemental standard applies  
10 to questions of impairment in ground water cases, namely, PCW 90.44.070  
11 which provides that:

12 No permit shall be granted for the . . . withdrawal of  
13 public ground waters beyond the capacity of the underground  
14 bed . . . or locality to yield such water within a reason-  
15 able or feasible pumping lift . . . The supervisor of water  
resources shall have the power to determine whether the  
granting of any such permit will injure or damage any vested  
or existing right or rights under prior permits . . . .

16 Shinn v. Department of Ecology, PCHB No. 613 (1975), Shinn v. Department  
17 of Ecology, PCHB No. 648 (1975), Heer Brothers v. Department of Ecology,  
18 PCHB No. 694 (1976), Savaria v. Department of Ecology, PCHB No. 77-20  
19 (1977); Heer Brothers v. Department of Ecology, PCHB No. 1135 (1977).

20 Therefore, impairment does not mean any detrimental effect upon a prior  
21 water right, however slight. Rather, (in the case of wells) impairment  
22 means the reduction of an existing well's water level below a reason-  
23 able, feasible pumping lift. What is reasonable and feasible depends  
24 on economics as well as other factors, Shinn v. Department of Ecology,  
25 PCHB No. 613 (1975).

26 FINAL FINDINGS OF FACT,  
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1 III

2 On review before this Hearings Board, the first issue for determination  
3 of impairment, however, is whether (a) a proposed well will, beyond  
4 speculation, have a detrimental effect upon a lawful existing well, or  
5 (b) well levels in an area show a substantial, cumulative increase in  
6 pumping lift. Heer Brothers v. Department of Ecology, PCFB No. 894  
7 (1976) and Savaria v. Department of Ecology, PCFB No. 77-20 (1977). If  
8 one or both conditions do exist, then the Department must come forward  
9 with its determination of the reasonable pumping lifts which it will  
10 protect in existing lawful wells, and this will be the starting point  
11 for determining whether or not a proposed new permit impairs an existing  
12 water right. If, however, neither threshold condition is found to exist,  
13 there can be no impairment. The burden of proof is on the appellant  
14 who has failed to show either of the threshold conditions, thereby  
15 failing to prove that issuance of the present permit will impair an  
16 existing water right. A permit must therefore issue.

17 If, in the future, however, actual measurement of well levels shows  
18 a substantial, cumulative increase in pumping lift from the upper  
19 domestic aquifer, then under RCW 90.44.070, the Department of Ecology  
20 must determine a range within which pumping lifts would be reasonable  
21 for domestic pumping developments in the area. Savaria v. Department  
22 of Ecology, PCFB No. 77-20 (1977). The effect of RCW 90.44.070, once  
23 the Department is required to determine a range of reasonable pumping  
24 lifts, is to prohibit issuance of further ground water permits until  
25 that determination is made. Heer Brothers v. Department of Ecology,  
26 PCFB No. 894 (1976). Once the Department determines a range of reason-

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1 able pump lifts, that determination becomes the starting point for  
2 deciding whether future proposed wells impair lawful existing wells.  
3 Shannon Department of Ecology, PCB No. 613 (1975).

4 IV

5 The 800 acres to which the present ground water application  
6 pertains is also served by a surface water right. A permit for ground  
7 water must not issue which, in conjunction with the existing surface  
8 water certificate, gives even the appearance of allowing an application  
9 of more water than the water duty associated with that 800 acres. The  
10 ground water permit to be issued to Lehn Ranches, Inc. must therefore  
11 be explicitly conditioned to prohibit use of water, under combined water  
12 rights, which exceeds the water duty of the land to be irrigated under  
13 that permit.

14 Upon issuance of the ground water permit applied for, Lehn  
15 Ranches, Inc. may develop an entirely new well or finish constructing  
16 the test well according to permit specifications. If it elects the  
17 former, the test well is subject to regulatory action by the Department  
18 including, at minimum, an order that casing and sealing be completed to  
19 a depth of 300 feet as required by the original authorization of the  
20 test well.

21 V

22 Any Finding of Fact which should be deemed a Conclusion of Law  
23 is hereby adopted as such.

24 From these Conclusions, the Board enters this

25 ORDER

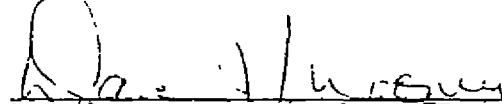
26 The Findings of Fact and Order issued by the Department of Ecology  
27 FINAL FINDINGS OF FACT,  
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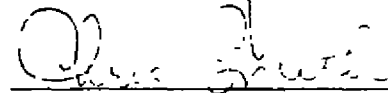


1 are hereby affirmed. This matter is remanded to the Department of  
2 Ecology for issuance of a permit in accordance therewith; provided,  
3 however, that such permit shall contain a condition to assure that no  
4 amount of water may be applied, under combined water rights, which  
5 exceeds the water duty of the land to be irrigated under this permit.

6 DONE at Lacey, Washington, this 6th day of June, 1978.

7 POLLUTION CONTROL HEARINGS BOARD

8   
9 DAVE J. MOONEY, Chairman

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11 CHRIS SMITH, Member

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27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER